SUPREME COURT, U. S.

SEP 1 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 566

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR, *Petitioners*,

v.

DOLORES K. MURPHY, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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v.

DOLORES K. MURPHY, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Fourth District, entered in the above entitled case on July 26, 1966.[1]

CITATIONS TO OPINIONS BELOW

The Final Decree of the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County (R. Vol. I.

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1. The other Respondents are John E. Murphy, Harold L. Lane and C. C. Callaway, as Co-Executors under the Last Will and Testament of M. E. Murphy, M. A. Ramsey, Robert Elmore, Joseph C. Mackey, William Atwill, Jr., and George Kennedy.

pp. 105-108) is unreported and is printed in Appendix B hereto, *infra*, p. 24. The opinion of the District Court of Appeal of the State of Florida, Fourth District. (R. Vol. IV, pp. 1-5) printed in Appendix B hereto, *infra*, p. 18, is reported at 188 So. 2d 884.

JURISDICTION

The judgment of the District Court of Appeal of the State of Florida, Fourth District, was entered on July 26, 1966 (R. Vol. IV, pp. 1-5; Appendix B, p. 18, *infra*). Rehearing was denied on August 24, 1966 (R. Vol. IV, p. 6). Petitioners' application for a writ of certiorari was denied by the Supreme Court of Florida on March 29, 1967 (R. Vol. IV, p. 7). Rehearing was denied on June 8, 1967 (R. Vol. IV, p. 8).

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3), as Petitioners' rights and privileges under a statute of the United States have been denied.

QUESTION PRESENTED

Whether a seller of securities is deprived of its federal right to rely upon investment letters executed by the purchasers of such securities at the time of sale, evidencing the intent of the parties that the sale be exempted from federal registration requirements by Section 4(2) of the Securities Act of 1933, by the judgment of a state court which refuses to give effect to such investment letters by construing the contract pursuant to which the sale took place to require registration with the Securities and Exchange Commission within six months after the sale, and treats such letters as mere 'receipts'.

STATUTES INVOLVED

The statutory provisions involved are Sections 5 and 4(2) of the Securities Act of 1933, Title 15 United States Code §§ 77e and 77d(2).[2] They are printed in Appendix A, *infra*, pp. 16-17.

STATEMENT

The Respondents were the controlling stockholders ("the Stockholders") of the Fort Pierce Port & Terminal Co. ("Terminal Co."). Petitioner John D. MacArthur was President and a substantial stockholder of Petitioner Royal American Industries, Inc. ("Royal American"). On August 1, 1962, Royal American, MacArthur, Terminal Co. and the Stockholders entered into a written agreement (the "Agreement"), under which the Stockholders agreed to exchange with Royal American 1,293,980 shares of common stock of Terminal Co. on a three-for-one basis for certain shares of Royal American stock (R. Vol. I, pp. 60-67). The pertinent provisions of the Agreement are paragraphs numbered (4) and (5):

> "(4) That ROYAL AMERICAN further agrees that it will cause the stock to be transferred to said STOCKHOLDERS to be registered with the American Stock Exchange without reservation or restriction in order that said stock may be freely exchanged or traded thereon. ROYAL AMERICAN further agrees that if it becomes necessary it

2. At the time of the transaction involved, the private offering exemption was contained in the second clause of Section (4)(1) of the 1933 Act (15, U.S.C. §77(d)(1)). However, in 1964, prior to the time of trial, the statute was amended and the clause containing the private offering exemption was renumbered Section 4(2) (15 U.S.C. §77(d)(2)) (78 Stat. 580, effective August 20, 1964). The statutory provision granting the exemption claimed herein will be hereafter referred to as amended in 1964.

will register or cause to be registered said stock with the Securities Exchange Commission and such other governmental agency as may be required. ROYAL AMERICAN further agrees that if it is unable to procure such registration as is required in accordance with the terms of this agreement it will pay to the said STOCKHOLDERS the sum of $2.50 per share of ROYAL AMERICAN stock called for under the terms of this agreement;

"(5) ROYAL AMERICAN further agrees to proceed with the registration of the stock within sixty days from date of the closing of this transaction, and to proceed with such registration continuously and diligently. ROYAL AMERICAN further agrees that if said registration is not completed within six months from the date of the closing of this transaction it will pay to the STOCKHOLDERS the sum of $2.50 for each share of ROYAL AMERICAN stock, provided, however, that the STOCKHOLDERS shall demand and accept the payment of $2.50 for each share of ROYAL AMERICAN stock not later than six months after the six months above mentioned expires. The STOCKHOLDERS shall have the right to either keep the unregistered stock or demand payment and receive payment immediately upon demand after the six months' period expires, provided, however, that such demand must be made within six months after the six months' period above mentioned has expired;" (R. Vol. I, p. 61).

Petitioner MacArthur agreed (Agreement, Paragraph 23; R. Vol. I, pp. 65-66) to guarantee the performance of Royal American under Paragraph 5 of the Agreement.

The closing of the transaction took place on November 7, 1962, at which time Royal American delivered and the Stock-

holders accepted certificates for the shares of Royal American stock which bore the following legend:

> "The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be sold, transferred, pledged or hypothecated in the absence of an effective Registration Statement for the shares under the Securities Act of 1933 or an opinion of counsel for the Corporation presented to it prior to the proposed transaction that registration is not required under said Act." (R. Vol. I, p. 8)

In addition, the Stockholders individually executed and delivered to Royal American at the closing investment letters whereby they acknowledged that they represented and agreed as follows:

> "This will also acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of the same, subject only to my rights under such Agreement and Addendum." (R. Vol. I, pp. 53-58).

The Royal American shares delivered to the Stockholders at the closing, while listed with the American Stock Exchange (R. Vol. III, pp. 52-53), were thus not registered with the Securities and Exchange Commission, nor did Royal American proceed to cause such shares to be so registered within six months from the date of the closing.[3] Thereafter the Stockholders made demand upon Royal American and MacArthur to purchase the Royal American shares at $2.50 per share. The refusal

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3. The shares were subsequently registered with the SEC (in December, 1963) for reasons unrelated to the Agreement or the controversy involved here (R. Vol. III, p. 54).

of Royal American and MacArthur to comply with this demand resulted in the present litigation.

In the trial Court,[4] the Stockholders sought a decree ordering specific performance of Paragraphs 4, 5 and 23 of the Agreement, requiring Royal American and MacArthur to pay to the Stockholders $2.50 per share of the Royal American stock transferred pursuant to the Agreement (R. Vol. I, pp. 23-47). Royal American and MacArthur urged, among other things, that their obligation under the Agreement was to register the shares with the Securities and Exchange Commission only if such registration became necessary; that since it had been decided prior to and at the closing that the Stockholders would take the stock for investment rather than for resale or distribution to the public, thus making available the Section 4(2) exemption from the registration requirements of the Securities Act of 1933, registration with the Securities and Exchange Commission was rendered unnecessary; that the fact the Stockholders accepted the share certificates bearing the restrictive legend and executed the investment letters referred to above indicated the intention of the parties that the transaction was protected by the private offering exemption; and that to construe the Agreement to require registration by Royal American within six months of the closing would impute to Royal American and MacArthur and to the Stockholders an intent to violate the 1933

4. Royal American had filed a Complaint on or about May 24, 1963, seeking a declaration of its rights under the contract, or rescission of the contract or affirmative relief, and the Stockholders filed Answers and Counterclaims, during the period between March 31, 1964, and May 5, 1964, seeking specific performance. At the pretrial conference, which was held on October 21, 1964, the parties entered into a Stipulation pursuant to which Royal American agreed to withdraw its Complaint and it was agreed that the litigation would proceed on the Counterclaims of the Stockholders, with the Stockholders becoming plaintiffs and Royal American becoming defendant. MacArthur was also joined as a defendant at that time. (R. Vol. II)

Act by mechanically following the procedure generally employed to bring a transaction within the private offering exemption (*i.e.*, the execution of the investment letters) but without the bona fide investment intent necessary to render the transfer of unregistered stock lawful; and that the alternative construction of the Agreement together with the execution of the investment letters and acceptance of the certificates bearing the restrictive legends was the only construction consistent with an intention of the parties to close the transaction in strict compliance with the Securities Act of 1933.[5]

The trial Court denied the relief sought by the Stockholders (R. Vol. I, pp. 105-108; Appendix B, *infra*, pp. 18-23). The effect of its decision was to hold the Stockholders to their investment representations and to recognize the transaction as one completed in strict compliance with the federal law.

The District Court of Appeal reversed with directions that the trial Court enter a decree requiring Royal American, and upon its failure to perform, John D. MacArthur, to purchase

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5. For example, petitioners summed up the position taken by them at trial in their trial memorandum as follows:

> 'The plaintiffs are taking the untenable position that they really didn't mean it when they said they took the stock for investment purpose and they had no present intention of selling or disposing of it and that the truth of the matter is they wanted to sell it immediately but they just signed that statement so they could circumvent the federal law.'
>
> • • •
>
> 'The only way this contract and closing transaction can be interpreted so as to be within the bounds of federal law is to determine that this was a bona fide exempt transaction under the Securities Act of 1933. This means that the investment letters are exactly what they imply, an honest representation of investment and not a subterfuge. To hold otherwise the Court would be aiding and abetting the plaintiffs in violating the federal law.' *Memorandum Submitted by Royal American Industries, Inc., pp. 12, 13.*

the stock of Royal American from the Stockholders at $2.50 per share, with interest. The Court recognized that the transaction could not lawfully be closed, in the absence of an effective registration statement as to the Royal American shares, unless the transaction qualified as an exempt transaction (R. Vol. IV, p. 4; Appendix B, *infra*, p. 22); it also recognized that the transaction could qualify for the private offering exemption only "if it could be said that the securities were acquired by the purchasers for purpose of investment and with no present intention to dispose of the same." (*Ibid.*) However, the Court indicated that the "investment intent" of the purchasers necessary to qualify the transaction for the private offering exemption need not be a bona fide intent to hold the securities indefinitely but that an intent to hold the securities for a six month period pending registration would suffice (R. Vol. IV, pp. 3-4; Appendix B, *infra*, pp. 21-22). It thus held that the investment letters executed by the Stockholders, which it characterized as "receipts", and their acceptance of certificates containing the restrictive legend, were effective to render the transfer of the unregistered Royal American Stock to the Stockholders lawful under the Securities Act of 1933, but that they did not bind the Stockholders to hold the securities "for investment" within the meaning of that term under the 1933 Act, the Regulations promulgated by the Securities and Exchange Commission thereunder, or the decisions of the federal courts relating thereto. The Court stated that the letters constituted neither a "modification" of the covenant to register in the Agreement nor a "waiver" of the Stockholders rights to receive registered shares under the Agreement (R. Vol. IV, pp. 4-5; Appendix B, *infra*, pp. 22-23). Had the Court understood the significance, or even considered the existence, of the phrase "if it becomes necessary" in the covenant to register, it could have given full effect to the Stockholders' investment representations as an event contemplated by the Agreement rendering registration "unnecessary" under the

1933 Act, and would have been compelled to affirm the judgment of the trial Court in order to avoid construing the Agreement, together with the investment letters, as a transaction constituting an intentional attempt by the parties to evade the registration requirements of the Securities Act of 1933.

The Florida Supreme Court, holding that it lacked jurisdiction over the cause,[6] denied Petitioners' applications for a writ of certiorari (R. Vol. IV, p. 7), and for rehearing (R. Vol. IV, p. 8).

REASONS FOR GRANTING THE WRIT

1. The holding of the Florida District Court of Appeal that the investment representations of the Stockholders (hereafter "Respondents") were merely "receipts",[7] not evidencing any bona fide intent on the part of the purchasers to hold the securities for investment rather than for resale, and its refusal to view them as constituting an event which rendered registration unnecessary under the Agreement,[8] constitutes a decision by that

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6. That Court held that the District Court's decision did not directly conflict with any decision of any other Florida District Court of Appeal or of the Supreme Court of Florida on the same point of law, and hence that the case did not fall within the jurisdiction granted to it by Article V, Section 4 of the Constitution of the State of Florida.
7. This characterization by the Florida Court of the investment letters as mere "receipts" indicates clearly its misunderstanding of the status of such documents under federal law. Professor Loss has termed such letters "an integral feature of private offerings", noting that it is "prudent for the issuer . . . to request investment letters from the buyers." 1 LOSS, SECURITIES REGULATION, 666, 665 (2d ed. 1961).
8. The inconsistency and danger of combining an unconditional covenant to register with an investment letter has been pointed out by Professor Loss: "[T]he prudent buyer's exaction of a registration covenant from the issuer in the event of resale might itself damn the transaction." 1 LOSS, *supra*, at 671.

Court on a federal question of substance which is in clear conflict with the principle embodied in the decision of the United States Court of Appeals for the Second Circuit in *Gilligan, Will & Co. v. Securities and Exchange Comm'n*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

The Florida Court's holding that the intent of the parties under the Agreement was that Royal American was bound by its covenant to register within six months "if it becomes necessary" even though Respondents had represented that they were taking the securities for investment clearly imputes to the parties, experienced businessmen, the intention that Respondents' investment representations meant that they intended to hold only for six months and no longer. Under the Second Circuit's decision in *Gilligan, Will* taking with such an intent constitutes an intentional violation of Section 5 of the Act which requires registration in advance of sale.

The Second Circuit in *Gilligan, Will* affirmed the announcement of the Securities and Exchange Commission[9] that the intention of a purchaser of securities to hold them for the six months' "capital gains period", to hold them for deferred sale, to hold them for a market rise, or to hold them for a year does not constitute a statutory basis for the private offering exemption from the registration requirements of the 1933 Act. Thus, there is a clear conflict between the decision of the Florida Court and the decision of the Court of Appeals for the Second Circuit in *Gilligan, Will* as to the nature of the "investment intent" required to bring a transaction within the private offering exemption of the 1933 Act. It is submitted that such a conflict presents a substantial reason for this Court to grant the petition for certiorari here. See *Katzinger v. Chicago Mfg. Co.*, 329 U.S.

9. *Re: The Crowell-Collier Publishing Company*, SEC Securities Act Release No. 3825 (August 12, 1957).

394, 398 (1947); *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947).

2. The Florida decision, which constitutes a refusal to enforce the investment representations of the Respondents and in effect grants them permission to deny that they meant what they represented and agreed to at the closing, is in clear conflict with federal policy, to further compliance with the Act, to hold purchasers of securities transferred under the private offering exemption to their investment representations.

It directly conflicts with the principle adopted by the Second Circuit in *Fuller v. Dilbert*, 358 F.2d 305 (2d Cir. 1966), *aff'g on opin. below* 244 F.Supp. 196 (S.D.N.Y. 1965). In that case the United States District Court for the Southern District of New York (Weinfeld, J.), held that:

> "The only question before the Court is whether a purchaser of unregistered stock who is capable of fending for himself and who contracts that he . . . [is] taking for investment purposes only, may rescind the purchase[10] because of his own then undisclosed breach of contractual duty. [The purchaser] may be held to his undertaking to hold for investment. . . . Here there is no basis for any finding that the initial undertaking to hold for investment was designed to circumvent the registration requirements of the Act. Here there is no reason why the original agreement [to purchase the securities] should not be enforced; there are persuasive reasons why they should." 244 F.Supp. at 214.

Of similar import is *The Value Line Fund, Inc. v. Marcus*, CCH Fed. Sec. L. Dec. ¶91,523 (S.D.N.Y. 1965), where the

10. There rescission was sought under §12(1) of the Securities Act.

United States District Court for the Southern District of New York held that the purchasers there were estopped from denying that they intended to hold the securities for investment where they had executed investment letters at the time of the sale. See also *Fuller v. Dilbert*, 32 F.R.D. 60, 64 (S.D.N.Y. 1962) (dictum). State Court decisions are in accord. See *Short v. Soil Builders Int'l Corp.*, CCH Fed. Sec. L. Dec. ¶91,188 (Tenn.Ct. App. 1962); *cf. Altman v. American Foods, Inc.*, 262 N.C. 671, 138 S.E.2d 526 (1964).

The decision below, insofar as the effect of its construction of the Agreement together with the investment letters, is to impute to the parties an intention which, under the federal decisions, constitutes an intent to violate the Securities Act, not only deprives Petitioners of their right to rely on Respondents' investment representations in order to take advantage of the private offering exemption, but conflicts with the policy reflected in *Hunt Foods & Indus., Inc. v. Doliner*, 49 Misc.2d 246, 267 N.Y.S.2d 364, (Sup.Ct.) *rev'd on other grounds*, 26 App.Div.2d 41, 270 N.Y.S.2d 937 (1st Dep't 1966), that the state courts should not presume noncompliance with the Securities Act of 1933 by the parties to a sale of securities subject to that Act.

3. The decision of the Florida Court is also diametrically opposed to the Securities and Exchange Commission's construction of the investment intent requirement. In addition to its statement in the Crowell-Collier Release referred to above, the Commission has promulgated Regulation § 231.4552; 27 Fed. Reg. 11316 (1962), which provides in part that "... a limitation upon resale for a stated period of time or under certain circumstances would tend to raise a question as to original intent ..." See also SEC Securities Act Release No. 1862 (December 13, 1938). Such a conflict constitutes an additional reason

for the granting of certiorari in this case. See *Patterson v. Lamb*, 329 U.S. 539, 541 (1947).

4. The decision of the Florida Court is not only in conflict with the many federal and state decisions respecting the relationship of investment representations of the sort involved here and the availability of the private offering exemption, but it is clearly erroneous. The proper construction of the covenant to register "if it becomes necessary" in the Agreement, read together with the investment representations made by Respondents at the closing, is the one which was urged by Petitioners below and upon which they base their claim of federal right here—that the covenant to register the shares was intended to be operative only if registration became necessary; registration would be necessary if Respondents decided (between the execution of the Agreement and the date of the closing) to take for resale rather than for investment; by the time of the closing it had been decided that the purchase would be for investment rather than for resale. At this point the covenant to register became inoperative, since registration under those circumstances was not "necessary" under Sections 5 and 4(2) of the 1933 Act and the Regulations thereunder. The Florida Court's reference to the investment letters as mere "receipts" indicates that Court's basic misunderstanding of the nature of the transaction and the federal issues involved therein. Its holding that the covenant to register was absolute and unconditional rendered the words "if it becomes necessary" surplusage. If it had recognized the existence of these words it would have been able to view the investment letters as a possible event contemplated by the words "if it becomes necessary". In such a way it could have found meaning in all of the terms and documents involved in the transaction, and thus avoided a laborious and arbitrary construction of such terms and documents, rendering many of the acts of the parties mere surplusage; it could have adopted a construction which was con-

sistent with the established federal law governing the application, operation, and construction of the Securities Act of 1933, which did not impute to the parties an intent to violate the federal law, and which did not deprive Petitioners of their federal rights with respect to the availability of the private offering exemption. For the reason that the decision is so clearly erroneous, as well as the fact that it conflicts with the numerous federal and state decisions regarding the Act and the exemption here involved, Petitioners submit that this Court should grant the petition prayed for. See *Williams v. Lee*, 358 U.S. 217, 218 (1959).

5. The importance, to the general public, of the issue involved here relating to the federal status of the investment letter, which has become, as Professor Loss puts it, "an integral feature of private offerings" (1 LOSS, *supra*, at 666), is indicated by the numerous decisions above referred to. Further, the private offering exemption is one of the most frequently invoked exemptions from the registration provisions of the federal securities acts, and is thus involved in a large number of transactions by which unregistered securities change hands, many of which result in litigation involving questions as to the status of the type of document here involved. Petitioners urge that the question presented here is of sufficient public importance to warrant this Court's exercise of its jurisdiction to review the Florida Court's decision, which, it is submitted, conflicts with existing law and completely misapprehends and misapplies the Securities Act of 1933, resulting in a denial to Petitioners of important rights thereunder.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Cited and Quoted

Securities Act of 1933, Sections 5, 4(2)
(Title 15 United States Code §§77(e),(d)(2))

Section 5

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title. May 27, 1933, c. 38, Title I, § 5, 48 Stat. 77; June 6, 1934, c. 404, § 204, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 7, 68 Stat. 684.

Section 4(2)

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to—

* * *

(2) transactions by an issuer not involving any public offering.

APPENDIX B

Judgment and Opinions Below

Opinion and Judgment of the District Court of Appeal of the State of Florida, Fourth District

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1966

DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, et al.,

Appellants,

v.

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,

Appellees.

CASE NO. 178.

Opinion filed July 26, 1966.

Appeal from the Circuit Court for Palm Beach County; R. O. Morrow, Judge.

R. Bruce Jones of Jones Adams Paine & Foster and H. L. Cooper, Jr., of O'Connell & Cooper, West Palm Beach; Samuel O. O'Bryan, Jr., of English McCaughan & O'Bryan, Fort Lauderdale;

and Phillip Goldman of Scott McCarthy Preston & Steel, Miami, for appellants.

C. Robert Burns of Burns Middleton Rogers & Farrell, Palm Beach, for appellees.

ANDREWS, Acting C.J.

This is an appeal by the plaintiffs, Dolores K. Murphy et al., from a final decree in favor of defendants, Royal American Industries, Inc., and John D. MacArthur.

Plaintiffs were the controlling stockholders of the Fort Pierce Port & Terminal Co. John D. MacArthur was President of Royal American Industries. On August 1, 1962, Royal American, MacArthur, Terminal Co. and plaintiffs entered into a written agreement under which plaintiffs agreed to exchange 1,293,980 shares of their Terminal Co. stock on a basis of three shares for one share of Royal American stock.

The agreement included the following provision:

"(4) That ROYAL AMERICAN further agrees that it will cause the stock to be transferred to said STOCKHOLDERS to be registered with the American Stock Exchange without reservation or restriction in order that said stock may be freely exchanged or traded thereon. ROYAL AMERICAN further agrees that if it becomes necessary it will register or cause to be registered said stock with the Securities Exchange Commission and such other governmental agency as may be required. ROYAL AMERICAN further agrees that if it is unable to procure such registration as is required in accordance with the terms of this agree-

ment it will pay to the said STOCKHOLDERS the sum of $2.50 per share of ROYAL AMERICAN stock called for under the terms of this agreement.

"(5) ROYAL AMERICAN further agrees to proceed with the registration of the stock within sixty days from date of the closing of this transaction, and to proceed with such registration continuously and diligently. ROYAL AMERICAN further agrees that if said registration is not completed within six months from the date of the closing of this transaction it will pay to the STOCKHOLDERS the sum of $2.50 for each share of ROYAL AMERICAN stock. . . ."

The provision to buy back the stock if not registered within sixty days was personally guaranteed by defendant, MacArthur. At the closing on November 7, 1962, the certificates for the shares of Royal American stock which were delivered to and accepted by plaintiffs bore a "restrictive legend" to the effect that the shares had been acquired by plaintiffs for purposes of investment, had not been registered under the Securities Act of 1933 and could not be transferred in the absence of an effective registration statement under that act.

Plaintiffs at closing signed a receipt commonly referred to as an investment letter which, in addition to describing the contract and the particular securities being exchanged, contained the following paragraph:

"This will also acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of the same, subject only to my rights under such Agreement and Addendum."

The Royal American stock was not registered with the American Stock Exchange or the Securities and Exchange Commission within six months so as to become freely exchanged or traded on the American Stock Exchange. The fact that the subject securities were registered with the Securities and Exchange Commission by prospectus effective December 23, 1963, is immaterial.

Plaintiffs made a demand upon Royal American and MacArthur for the purchase of the stock at $2.50 per share. Royal American and MacArthur failed to comply with the demand and plaintiffs sought a decree requiring the defendant to purchase their Royal American stock at $2.50 per share.

The trial court found that Royal American had not complied with the agreement and would be liable to repurchase the shares for failure to obtain their registration within six months under the provisions of paragraph 5, except that the contract had been modified at the closing by the investment letter.

Royal American had issued certain securities in exchange for property to Bankers Life & Casualty Insurance Company in a transaction not involving any public offering which it desired to loan to the company for use in exchange for the Terminal Co. stock. On September 27, 1962, New York counsel for Royal American advised that such was possible, but only on a restricted basis, and that authorized but unissued stock could not be issued without registration under the Securities Act. It was then that the Royal American approached the stockholders of Fort Pierce Terminal requesting that they acknowledge the stock of Royal American which they would receive would be for purposes of investment and not for resale. Under the contract of August 1, 1962, they might have to hold their stock before resale for six months awaiting the registration of the securities they were to receive in accordance with the terms of the contract.

In order for the securities of Royal American to be transferred in exchange for the stock of Fort Pierce Terminal such stock would have to be registered under the Securities Act of 1933, 15 U.S.C.A. § 77(f), as amended, or the Securities and Exchange Act of 1934, as amended, 15 U.S.C.A. § 78(1), or qualify as an exempt transaction by an issue not involved in a public offering, 15 U.S.C.A. § 77(d). When a company already has stock listed on a national securities exchange, it can apply for listing of additional securities under procedures under the Securities and Exchange Act of 1934, which in substance has the same requirements as registration with the Securities and Exchange Commission. 2 LOSS, SECURITIES REGULATIONS 787 (2d Ed. 1961). Therefore, the stock of Royal American could only be issued prior to the effective date of registration statement under either of these acts if it could be said that the securities were acquired by the purchasers for purpose of investment and with no present intention to dispose of the same.

Under the circumstances the contract of August first could have been closed by delivery and exchange of the stock only in violation of the Securities Act, supra, in that it had not been registered in compliance with either of the said acts. The receipt reciting an intention not to dispose of said stock was executed at the request of Royal American in an effort to avoid such violation. Such receipt did not constitute a modification of the contract in that there was no consideration for a change or modification. Gunby v. Drew, 1903, 45 Fla. 350, 34 So. 305; Robinson v. Hyer, 1895, 35 Fla. 544, 573, 17 So. 745, 750. An estoppel did not arise in that by signing the investment letter plaintiffs received no benefit but merely acknowledged a known fact that they might not be able to sell their stock until registered, and such action by the plaintiffs was not to the detriment of the defendants. Enstrom v. Dunning, 1939, 136 Fla. 253, 186 So. 806, 812. The same did not constitute a waiver of the provisions of

the contract in that there was no showing of the intentional relinquishment of a known right. Macina v. Magurno, Fla. 1958, 100 So.2d 369.

Accordingly, we reverse with directions that the court enter a decree requiring Royal American, and upon its failure to perform, John D. MacArthur, to purchase the stock of Royal American Industries, Inc., from the plaintiffs at a price of $2.50 a share, together with interest thereon from the date demand was made for payment, or May 1, 1963, whichever is later.

WALDEN, J., and RAWLS, JOHN S., Associate Judge, concur.

Opinion of R. O. Morrow, Circuit Judge

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY. IN CHANCERY

NO. 63 C 1097-B

DOLORES K. MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR., and GEORGE KENNEDY,

Plaintiffs,

vs

ROYAL AMERICAN INDUSTRIES, INC., and JOHN D. MacARTHUR,

Defendants.

FINAL DECREE

This cause was set for trial on October 21, 1964, and at that time a pretrial conference was held, and the record of the pretrial proceedings was taken and constitutes 51 pages. Among the stipulations entered into at pretrial were that the plaintiff withdrew its Complaint, and the original defendants would become the plaintiffs and proceed on their respective counterclaims and crossclaims, and the plaintiff, ROYAL AMERICAN INDUSTRIES, INC., and the defendant, JOHN D. MacARTHUR, would be the defendants. The plaintiffs are DOLORES K.

MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR., and GEORGE KENNEDY. Hereafter, the parties will be referred to as stated above.

The plaintiffs bring suit for specific performance of contract and the defendants rely upon the general denial and affirmative pleas of waiver and estoppel. The Court has considered all of the stipulations and admissions, as set forth in the pretrial conference, and has heard all of the testimony and examined all of the documents admitted at trial, which was held on November 4, 1964; and finds as follows:

The defendant, ROYAL AMERICAN, entered into a contract with the plaintiffs on August 1, 1962, whereby Royal American agreed to purchase from the plaintiffs 1,293,980 shares of common stock of Ft. Pierce Port & Terminal Co., and to transfer to the plaintiffs one share of Royal American stock for each three shares of said Ft. Pierce stock. The contract further provides that the Royal American stock would be registered with the American Stock Exchange without reservations or restriction, in order that said stock would be freely exchanged or traded thereon; also, Royal American agreed in said contract that, if it became necessary, it would register or cause to be registered said stock with the Securities Exchange Commission. Also, if unable to procure such registration, it agreed to pay the plaintiffs the sum of $2.50 per share of Royal American stock, which was transferred in pursuance of said agreement. Royal American was to proceed with the registration of said stock within 60 days from the date of closing, and to have said registration completed within six months. The plaintiffs were to have the right to either keep the unregistered stock or to demand payment of $2.50 per share, if said stock was not registered within six months, provided demand was made within six months

after the deadline for registration. The transaction was closed on November 7, 1962. Some stock of Royal American Industries, Inc., had been registered with the American Stock Exchange and was tradable at the time of closing. At the time of closing, the stock which was delivered by the defendants to the plaintiffs had a legend printed on the stock, as follows: "These shares have been acquired for investment". The plaintiffs received said stock and each gave a letter wherein each agreed that he was purchasing said stock for investment and with no present intention of selling or otherwise disposing of said stock, but that the same was received subject to their rights under the agreement in question and the addenda to such agreement; said letters are plaintiffs' exhibits One through Six.

The first issue is a construction of the contract; the Court construes paragraph (4), of the contract, to mean that Royal American was to transfer Royal American Stock to the plaintiffs, which was freely exchangeable and tradable on the American Stock Exchange; further, that, if necessary, Royal American would register or cause to be registered said stock with the Securities Exchange Commission, in order that the same be freely tradable; and, if it were unable to procure such registration, it would buy back the stock at $2.50 per share. The Court construes paragraph (5), of the contract, to mean that Royal American had six months from the date of closing within which to effect such registration as was necessary.

The Court finds that Royal American failed to have said transferred stock registered so as the same was freely tradable on the American Stock Exchange within six months of closing; and, further finds that said stock was so registered and was freely tradable on the American Stock Exchange subsequent to said six months period; and further finds that Royal American did not comply with the agreement in question, and would be liable

under paragraph (5), of said contract, but for the fact that said contract was modified in writing by the agreements of the several plaintiffs above referred to as plaintiffs' exhibits One through Six. At the time of closing, the plaintiffs agreed to receive the said shares of stock with the legend on, as aforesaid, and stated they received the same for investment purposes, with no present intention of selling or otherwise disposing of the same. This altered the conditions of the original contract with reference to the stock being freely tradable and the time element of registration. The rights reserved in each of said alteration agreements were such rights under the agreement and addendum as were not in conflict with said alteration agreements. The fact that there was no "present intention" of selling or disposing of said stock by the plaintiffs renders the time element indefinite. The contract provides that Royal American would "proceed with such registration continuously and diligently", and this controls as to the final effecting of such registration. The Court finds that Royal American proceeded with diligence and did effect the registration necessary for said stock to be freely tradable, as aforesaid; it is thereupon

ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by their Complaint, and that the defendants go hence without day, and that each of the parties pay their respective costs.

Copy furnished counsel.

DONE AND ORDERED at West Palm Beach, Florida, this January 5, 1965.

R. O. Morrow
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Certiorari and Appendix has been served upon each of the following:

O'CONNELL and COOPER
Harvey Building
West Palm Beach, Florida

ENGLISH, McCAUGHAN & O'BRYAN
300 First Federal Building
Fort Lauderdale, Florida

JONES, ADAMS, PAINE & FOSTER
601 Flagler Drive Court
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SCOTT McCARTHY PRESTON & STEEL
1414 First National Bank Bldg.
Miami, Florida

attorneys for respondents, by mail, this ..... day of ....., 1967.

.....
Attorney for Petitioners